



FEDERAL ELECTION COMMISSION

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AGENDA ITEM

For Meeting of: AUG 8 1996

August 1, 1996

MEMORANDUM

TO: The Commission

THROUGH: John C. Surina
Staff Director

FROM: Lawrence M. Noble
General Counsel

N. Bradley Litchfield
Associate General Counsel

Rita Reimer
Staff Attorney

SUBJECT: Draft AO 1996-32

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for August 8, 1996.

Attachment

DRAFT

1 ADVISORY OPINION 1996-32

2
3 Craig M. Engle, General Counsel
4 National Republican Senatorial Committee
5 425 Second St. NE
6 Washington, DC 20002

7 Dear Mr. Engle:

8 This responds to your letter dated July 12, 1996, requesting an advisory opinion
9 on behalf of the National Republican Senatorial Committee ("NRSC" or "the
10 Committee") concerning the application of the Federal Election Campaign Act of 1971,
11 as amended ("the Act"), and Commission regulations to the Committee's proposed
12 transfer of certain funds from its non-federal to its Federal account.

13 You state that the NRSC is a national political party committee organized
14 primarily to support Republican candidates throughout the United States seeking election
15 to Federal office. If funds are available, the Committee also supports candidates at the
16 state and local level through a non-federal account.

17 You explain that, due to a number of variables beyond its control, it was
18 impossible for the Committee to determine at the start of the 1995-96 election cycle
19 whether it would be able to make expenditures on behalf of non-federal candidates during
20 the cycle. These variables include the level and types of non-federal funds available to
21 the Committee, the political environment, polling results, and the strength of the
22 candidate pool.

23 Because it was uncertain whether it would be able to provide support to any
24 non-federal candidates, the NRSC estimated, for purposes of the Commission's allocation
25 rules, that 100% of its activity during the 1995-96 election cycle would be directed

1 towards Federal candidates. The Committee spent the first part of the cycle collecting and
2 analyzing data on this topic. Based on this analysis, the Committee determined on April
3 22, 1996, that it will be able to make more than 35% of its total disbursements in support
4 of non-federal candidates.

5 Commission regulations at 11 CFR 106.5 set forth the procedures to be followed
6 by party committees that make disbursements in connection with both Federal and non-
7 federal elections. Under section 106.5(a), party committees may make such
8 disbursements in one of two ways: They may make them entirely from funds raised
9 subject to the prohibitions and limitations of the Act; or, if they have established separate
10 Federal and non-federal accounts pursuant to 11 CFR 102.5, they may allocate them
11 between these accounts according to various formulas set forth in section 106.5. You
12 state that the NRSC has adopted the second approach, establishing separate Federal and
13 non-federal accounts for this purpose.

14 Section 106.5(c) requires each national party Senate and House campaign
15 committee that makes both Federal and non-federal disbursements to allocate its
16 administrative expenses and costs of generic voter drives based on the ratio of Federal
17 expenditures to total Federal and non-federal disbursements made by the committee
18 during the two-year federal election cycle. 11 CFR 106.5(c)(1)(i). Regardless of the
19 allocation ratio calculated under this formula, each such committee must allocate to its
20 Federal account at least 65% of its administrative expenses and costs of generic voter
21 drives each year. 11 CFR 106.5(c)(2).

22 The committee reports an estimated ratio at the beginning of each Federal election
23 cycle, "based upon the committee's Federal and non-federal disbursements in a prior

1 comparable Federal election cycle or upon the committee's reasonable prediction of its
2 disbursements for the coming two years." 11 CFR 106.5(c)(1)(i). On each of its periodic
3 reports, the committee adjusts this ratio, if necessary, to reconcile it with the ratio of
4 actual Federal and non-federal disbursements made to that point in the cycle. 11 CFR
5 106.5(c)(1)(ii). If the revised ratio results in a higher Federal percentage, the committee
6 transfers funds from its Federal to its non-federal account, as necessary, to reflect the
7 adjusted ratio and avoid over-payment by the non-federal account. *Id.*

8 You have explained why, in your particular situation, it was impossible for the
9 NRSC to accurately estimate the 1995-96 Federal/non-federal allocation ratio until April
10 22, 1996: there was no "prior comparable election cycle" and no way to make a
11 "reasonable prediction" of the ratio until that date. The revised ratio has a smaller
12 Federal percentage than that originally reported to the Commission (65% rather than
13 100%), which could lead to the transfer of funds from the Committee's non-federal to its
14 Federal account. You state that the Committee would like to make such a transfer, and
15 request Commission approval of this action. If approval is given, you ask when the
16 transfer should be made, and when and how it should be reported.

17 You note that Commission rules at 11 CFR 106.5(c)(1)(ii) address transfers from
18 federal to non-federal accounts, but not the reverse situation. This is because the
19 allocation rules were designed to insure that only money raised subject to the Act's
20 prohibitions and limitations be used to pay the Federal portion of a committee's allocable
21 expenses. *Explanation and Justification of Regulations on Methods of Allocation*
22 *Between Federal and Non-Federal Accounts*, 55 Fed. Reg. 26058, 26059 (June 26, 1990).
23 There is no corresponding restriction on using Federal funds to pay the non-Federal

1 portion of the ratio. "[A]llocating a portion of certain costs to a committee's non-federal
2 account is a permissive rather a mandated procedure. Thus, the amounts that would be
3 calculated under the rules for a committee's Federal share of allocable expenses represent
4 the minimum amounts to be paid from the committee's federal account, without
5 precluding the committee from paying a higher percentage with Federal funds." *Id.* at
6 26063.

7 For this reason, 11 CFR 106.5(c)(1)(ii) requires covered committees to transfer
8 funds from their Federal to their non-federal account if a revised allocation ratio results in
9 a higher Federal percentage; but it does not require a corresponding transfer of funds
10 from a committee's non-federal to its Federal account if the new ratio reflects a lower
11 Federal percentage.

12 The Committee, had it so desired, could have reported the new ratio to the
13 Commission on the first report filed following its April 1996 determination; calculated
14 and reported the actual Federal and non-federal disbursements made as of that date; and
15 continued to use this approach in its subsequent filings. Section 106.5(c)(1)(ii).
16 However, because this is a permissive rather than a required transfer, there was no
17 requirement that it do so.

18 The Commission has allowed retroactive allocation of expenses in previous
19 advisory opinions. See Advisory Opinions ("AO") 1992-27, 1992-21, 1991-25, and
20 1991-15. In AO 1992-27, the Commission allowed a committee to retroactively allocate
21 certain expenses for the first fourteen months of a two-year election cycle. The
22 requesting committee could not do this sooner, because it did not have an accounting and
23 reporting system in place that could accommodate these then-new requirements. In each

1 of the cited AO's, the requesting committee was given thirty days from the date on which
2 the opinion was issued to make the retroactive allocation.

3 The Commission has not previously addressed the retroactive application of the
4 funds expended formula, including your particular question of whether a committee can
5 retroactively transfer funds to reflect a 65%/35% Federal/non-federal ratio outside the 60
6 day post-expenditure transfer window provided at 11 CFR 106.5(g)(2)(ii)(B). That
7 section establishes a 60-day post-expenditure deadline for required transfers from a
8 committee's non-federal to its Federal account.

9 However, since the payment of a portion of shared expenses by the non-federal
10 account is permissive, and the funds expended formula contemplates a continual
11 updating of the allocation ratio over the two year cycle, the Commission concludes that
12 the NRSC may retroactively allocate its administrative expenses and costs of generic
13 voter drives under 11 CFR 106.5(a)(2)(i) and (iv) for the period January 1, 1995, through
14 April 22, 1996. While the rules do not specify a timeframe for these transfers, other
15 transfers from the non-federal to the Federal account are governed by 11 CFR
16 106.5(g)(2)(ii)(B), which establishes a 60 day deadline. However, earlier advisory
17 opinions allowing retroactive transfers due to unusual circumstances have established a
18 deadline of 30 days after the opinion is issued; and the Committee has stated it is willing
19 to make the transfer within this 30 day period. The transfer must be included in the
20 NRSC's next report required to be filed after it is made. The Committee should report the
21 transfer on FEC Schedule H3, and note on that Schedule that the amount is being

transferred pursuant to this opinion. A sample Schedule H3 showing the transfer is attached.¹

The Commission notes that if at any time in the remainder of the 1995-96 election cycle the NRSC determines that its non-federal activity will fall below the 35% figure, it should report the new ratio and make the resulting transfer from its Federal to its non-federal account pursuant to 11 CFR 106.5(c)(1)(ii).

This response constitutes an advisory opinion concerning the application of the Act, or regulations prescribed by the Commission, to the specific transaction or activity set forth in your request. See 2 U.S.C. §437f.

Sincerely,

Lee Ann Elliott
Chairman

Enclosures (AOs 1992-27, 1992-21, 1991-25, 1991-15)

¹ The Commission concludes that it is not necessary for the NRSC to include with this report an explanatory letter such as that required from the requester in AO 1992-27. That request involved a large number of retroactive allocations and amended FEC Schedules, which is not true in this situation. The Committee may, of course, include such a letter with the report if it so desires.

**TRANSFERS FROM
NON-FEDERAL ACCOUNTS**

ATTACHMENT TO ADVISORY OPINION 1996-32

NAME OF COMMITTEE National Republican Senatorial Committee			TOTAL AMOUNT TRANSFERRED	
NAME OF ACCOUNT Non-federal account		DATE OF RECEIPT		\$ 00000
			BREAKDOWN OF TRANSFER RECEIVED	
			ADMIN./VOTER DRIVE AMOUNT	DIRECT FUND- RAISING AMOUNT
			EXEMPT ACTIVITY/DIRECT CANDIDATE SUPPORT	
i) Total Administrative/Voter Drive			\$ 00000 *	
ii) Direct Fundraising (List Events-Amount for Each)				
a) _____				
b) _____				
c) _____				
d) _____				
e) Total Amount Transferred For Direct Fundraising				
iii) Exempt Activity/Direct Candidate Support (List Events-Amount For Each)				
a) _____				
b) _____				
c) _____				
d) _____				
e) Total Amount Transferred For Exempt Activity/Direct Candidate Support				
NAME OF ACCOUNT		DATE OF RECEIPT		\$
			BREAKDOWN OF TRANSFER RECEIVED	
			ADMIN./VOTER DRIVE AMOUNT	DIRECT FUND- RAISING AMOUNT
			EXEMPT ACTIVITY/DIRECT CANDIDATE SUPPORT	
i) Total Administrative/Voter Drive				
ii) Direct Fundraising (List Events-Amount for Each)				
a) _____				
b) _____				
c) _____				
d) _____				
e) Total Amount Transferred For Direct Fundraising				
iii) Exempt Activity/Direct Candidate Support (List Events-Amount For Each)				
a) _____				
b) _____				
c) _____				
d) _____				
e) Total Amount Transferred For Exempt Activity/Direct Candidate Support				
			TOTALS FOR BREAKDOWN OF TRANSFER RECEIVED	
			ADMIN./VOTER DRIVE AMOUNT	DIRECT FUND- RAISING AMOUNT
			EXEMPT ACTIVITY/DCS	
SUBTOTAL THIS PAGE				
TOTAL THIS PERIOD				